

# ZONING AND PLANNING LAW REPORT



FEBRUARY 2013 | Vol. 36 | No. 2

## Mansionization and Its Ordinances: How's That Working Out for You?

By Paul J. Weinberg

*Paul Weinberg is a real property attorney practicing in Irvine, California. Since 1979, his Orange County practice has specialized in real estate, title, leasing, and real property development matters. Paul is the only non-architect member of the Laguna Beach, California Architectural Guild and acts as their legal counsel. He is a member of the Society of Architectural Historians and the American Institute of Architects. Paul has also served on the faculty at the University of California, Hastings College of Law in San Francisco, where he has taught civil trial practice, as well as teaching real property topics for the University's Continuing Education of the Bar, where he has moderated panels on a wide variety of real property topics statewide since 1988. He also authors articles for the University of California's Continuing Education of the Bar Real Property Law Reporter, and West's National Real Property Law Journal.*

### I. INTRODUCTION

The fluctuating size of single family homes and the cost and availability of housing in general in the United States is a topic on the minds of nearly everyone involved with the housing market now: first time home buyers who want a larger house; homebuilders trying to figure out how big a house to build to accommodate the need; lenders and appraisers trying to determine how much of a house a borrower can realistically afford; and architects, planners, designers and planning commissions trying to cope with

the myriad of conflicting demands on them to “regulate” just how big a house can be built on a lot. These issues were being brought to a head in the late 1990’s and the early 2000’s by angry and resentful neighbors seeing large homes built next to them or in their neighborhoods, often blocking their light and air and interfering with the scale of other homes built in earlier times. Over the last 10 years we have watched and traced the progress of all of these groups in coming to grips with this problem and, if not finding a solution to it, at least modifying its impact. How have the planning system, architects,

# ZONING AND PLANNING LAW REPORT

Mansionization and Its Ordinances: How's That Working Out for You?..... 1  
 I. INTRODUCTION ..... 1

**Editorial Director**  
 Michael F. Alberti, Esq.  
**Contributing Editors**  
 Patricia E. Salkin, Esq.  
**Publishing Specialist**  
 Robert Schantz

**Electronic Composition**  
 Specialty Composition/Rochester Desktop Publishing

Zoning and Planning Law Report (USPS# pending) is issued monthly, except in August, 11 times per year; published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Application to mail at Periodical rate is pending at St. Paul, MN.

POSTMASTER: Send address changes to Zoning and Planning Law Report, 610 Opperman Drive, P.O. Box 64526, St. Paul MN 55164-0526.

© 2013 Thomson Reuters  
 ISSN 0161-8113

Editorial Offices: 50 Broad Street East, Rochester, NY 14694  
 Tel.: 585-546-5530 Fax: 585-258-3774  
 Customer Service: 610 Opperman Drive, Eagan, MN 55123  
 Tel.: 800-328-4880 Fax: 612-340-9378

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

builders and the legal system coped, adapted, and responded to it during that time?

To understand mansionization is to define it, not an easy task. In a June 2006 study commissioned by the Metropolitan Washington Council of Governments, an amalgam of planners, engineers, city and county officials and others, attempted to clarify and put into words a definition that didn't brook agreement among most of the people complaining about it:

*“For the purposes of this policy memo, mansionization is formally defined as ‘replacing (or constructing additions to) smaller dwellings within established neighborhoods with significantly larger homes,’ and is synonymous with residential infill development.”*<sup>1</sup>

This definition of mansionization is different than its colloquial one. Most stakeholders in the process refer to McMansions and monster homes in the same breath as mansionization and the colloquial definition encompasses this process, *whether it takes place as infill development or a component of “sprawl.”* Mansionization therefore may not describe the same problem to everyone; planners see it as an infill issue; most aggrieved residents who don't like big houses on small lots don't really care where they're located; they don't like looking at them or living near them.

So objectively, given the fact the problem existed in the early 2000's, what's happened to the sizes of houses since then and where do institutions, homebuilders and others see the trend moving? The Harvard Joint Center for Housing Studies issued a report in late 2011 entitled “The State of the Nation's Housing 2012” that studied, in great detail, common metrics describing housing trends in the United States. The most relevant metric in

their current report is the median sales prices of a single family home in the United States. In 2001, that price was \$198,901. In 2011, it had fallen to \$166,200. Not surprisingly, much of that disparity can be relegated to the economic crisis of late 2008 and its aftermath. As the report indicates, though:

*Markets at a Turning Point. While multifamily starts surged 54 percent and home improvement spending eked out a 0.6 percentage-point gain, single-family starts dropped some 8.6 percent last year. Because of the lag between starts and finished construction, completions of both single- and multifamily homes were also off more than 10 percent, falling to record lows.... The sharp and sustained retreat made 2011 the worst year for completions in records dating back to 1968.... The downturn in remodeling has also been sharp and prolonged, although not nearly as severe as in homebuilding. After a peak-to-trough drop of 28.4 percent (compared with more than 75 percent in new construction spending), home improvement spending increased to 49 percent of residential construction expenditures in 2011.<sup>2</sup>*

What colors this whole discussion is the fact that according to the report and its statistics, not only are homes worth less, but fewer people want to buy them and, correspondingly, build them. The Harvard report wasn't all doom and gloom:

*Signs of Recovery in the For-Sale Market. The for-sale housing market remained depressed for much of 2011. House prices in most areas continued to slide, sales were lackluster, and single-family construction hit a record low. But as the year ended, steadier job growth and improv-*

*ing consumer confidence boosted sales of both new and existing homes. With demand reviving and inventories of homes for sale depleted, home prices may well find a bottom this year.... Nevertheless, a number of conditions may keep the recovery in the owner-occupied market relatively subdued. The backlog of roughly two million loans in foreclosure means that distressed sales will remain elevated, keeping prices under pressure. Another 11.1 million homeowners owe more on their mortgages than their homes are worth, which dampens both sales of new homes and investment in existing units. And despite recent declines, the number of vacant homes is still well above normal, limited demand for new construction in many markets.<sup>3</sup>*

It's already easy to see that mansionization depends on a healthy economy, healthy bank balances of both builders and their buyers and a liquid, free lending market to afford the larger homes. None of these conditions exist right now; the report only bears that conclusion out.

The National Association of Home Builders is a trade association of builders that describes itself as:

*A federation of more than 800 state and local associations, NAHB represents more than 140,000 members nationwide. About one-third of NAHB's members are home builders and/or remodelers. The others are associates working in closely related specialties such as sales and marketing, housing finance, and manufacturing and supplying building materials.<sup>4</sup>*

The Association, among other lobbying activities, tracks and collates housing statistics

and trends in the USA. It issued a report in December 2010 summarizing its data collection and polling efforts among its members called “The New Home in 2015,” trying to prognosticate what changes would take place in new homes. In general, NAHB’s survey indicated that home sizes were trending *downward*, not upward:

*Average Home Size. Survey respondents were asked about their expectation for what the average size of new homes will be in 2015, given that in the first half of 2010 it stood just below 2,400 square feet. When all answers are aggregated, respondents expect the average size of a new single-family home in 2015 to be 2,152 square feet, about 10 percent smaller than homes started in the first three quarters of 2010.*

*Sixty-three percent of respondents reported the average size of new homes in 2015 will be somewhere between 2,000 square feet and 2,399 square feet, 22 percent indicated that it would be 2,400 square feet to 2,999 square feet, and only 1 percent over 3,000 square feet. Thirteen percent expect the average size of new homes to be only 1,600 square feet to 1,999 square feet, while two percent expect it to be less than 1,600 square feet.*

*In comparison, when the same question was posed to industry professionals in 2007, only 5 percent were of the opinion that new homes would have 1,999 square feet or less by 2015, 46 percent reported it would be 2,000 square feet to 2,399 square feet, and 48 percent expected it to top 2,400 square feet.<sup>5</sup>*

So now we have established that home builders anticipate home sizes getting smaller; academics and experts indicating that the soft-

ness of the economy is slowing construction in general and home prices are collapsing and regulators indicating that moratoria and regulation are the two primary levers to alleviate the problem.<sup>6</sup>

Flying in the face of all this are two inflammatory articles published in the *Wall Street Journal* in June of 2012. Two articles, both authored by Dawn Wotapka, a *Wall Street Journal* staff reporter, posit a reverse trend. The first one, dated June 7th, is entitled “Big Homes Are Back in Business.” It takes a decidedly upbeat tone:

*Big Homes Are Back in Business. Mechanicsburg, PA.—Jamie and Ashley Mengle spent the past four years in a 1,920-square-foot, three-bedroom town house. In July, they will upgrade to a 3,200-square-foot single-family home with four bedrooms here in this suburb of Harrisburg. The Mengles are at the forefront of a surprising trend in a number of new subdivisions across the nation: Bigger homes are making a comeback.*

*“There’s no doubt we’re a lot larger than we were a few years ago,” said Steve Ruffner, president of the Southern California division of KB Home, one of the nation’s largest builders. KB Home says the average square footage of houses currently under contract is 2,079, an increase of 13% from last year. And more KB buyers are picking models that exceed 3,500 square feet.*

*That is a change from the past few years, when builders were downsizing houses to accommodate an era of frugality and austerity. As the economy slowly improves and some consumers’ anxieties ease, buyers are upsizing again—though there*

*is far less demand than before for huge houses loaded with upgrades.*

*According to data from the Census Bureau, the average size of a newly built home was 2,480 square feet in 2011. That was up 3.7% from 2010 and represented the first annual increase since 2007.*

*Charter Homes & Neighborhoods, the company that is building the Mengles' new house, said the single-family homes it is delivering this year are 200 square feet larger than the ones they delivered last year, which works out to an increase of 5% to 10%. "The big sellers last year were town homes," said a company representative. This year, ... the trend is helping some builders see increased sales prices. In April, the average home price was \$282,600, up from \$268,900 a year earlier, according to census data, though that is down from \$329,400 in early 2007....*

*The return to bigger houses—which has taken industry watchers by surprise—indicates that the housing downturn paused, but didn't kill, America's love affair with supersize abodes. The trend is an encouraging sign for builders, which last year sold just 306,000 newly built homes, the lowest number since record-keeping began in 1963. A major driver behind the bigger-home trend is record-low interest rates, under 4% for a 30-year fixed-rate mortgage, which allow some buyers to move up without necessarily making larger mortgage payments....<sup>7</sup>*

Ms. Wotapka's second article expands on the impact of her first one in making the connection to "McMansions" and mansionization:

*McMansion Creep: Homes Rising in Size. Big homes are back in style. That's the*

*headline from the American Institute of Architects' first-quarter Home Design Trends Survey set to be released Thursday. Eight percent of the 500 architecture firms responding say square footage of homes increased in the first quarter, up from 5% a year ago. This change, the biggest year-over-year jump since the survey started in 2005, ends a multiyear march toward smaller homes driven by the housing implosion.*

*"We've begin to turn the corner here after a steep downturn," says Kermit Baker, the Washington, D.C.-based architecture group's chief economist. Want more evidence? Trulia's Chief Economist Jed Kolko wrote this week that 27% of Americans say their ideal home size is over 2,600 square feet, up from 17% in 2011. Those expressing interest in the 'super-sized' house category, 3,200 square feet and above, climbed to 11% from 6%....*

*But today's buyers are different from those seen during the buy-as-big-as-you-can boom. "People don't want bigger homes just to have bigger homes," says Steve Ruffner, present [sic] of the Southern California division for KB Home, one of the nation's largest home builders. "Buyers show up with calculators. They actually calculate cost per square foot. They really understand what they're getting for the money."<sup>8</sup>*

So which is it? Are we seeing a resurgence of "McMansions" and monster homes or have the excesses of the late 90's through 2007 and the resulting economic recession significantly tempered the desires and choices that both builders and their customers are making?

Part of the answer to this question and the charting of how the legal system deals with

it has to do with whether the development is infill or “sprawl.” One of the authors of the 2006 Metropolitan Washington Council of Governments’ report on mansionization makes the point that mansionization actually takes two forms. One is where an infill project takes land and zoning regulations that contemplated a certain style, scale, mass and bulk and then the owner builds a project to the absolute maximum permitted under that code with little regard for the issues of mass, scale and bulk. The other, the “McMansion” phenomenon, as the Metropolitan Washington Council of Governments indicates:

*So, while many people might assume that examples of this phenomenon [mansionization] would clearly be recognized and agreed to by others, many of the terms used to describe the “McMansionization” term more often refers specifically to very large, but very stylistically similar and similarly sized new homes that are being built primarily in developments in the out suburbs, while the “big hair” and “monster” terms are very pejorative in nature.<sup>9</sup>*

Clearly, both the law and community anger and frustration tend to focus more on the infill development problem than the tract houses in the outer suburbs. The reasoning is quite simple; everyone in the suburbs in one of these tracts is in an essentially identical home and is purchasing with knowledge that the neighbors will have a home of the mass, scale and bulk the same as theirs. This isn’t true in infill; an elderly homeowner living in a house built in the 1950s or 1960s, is likely to be shocked and frustrated by attempts by adjacent landowners to massively increase the mass, scale and bulk of homes built on small, adjacent lots.

What are some of the nuts and bolts of how communities have come to grips with this problem and tried to regulate it? In an excellent presentation at the American Planning Association’s annual conference in Denver, Colorado on April 1, 2003, attorney Dwight Merriam of the law firm of Robinson and Cole presented a lecture and Power Point presentation entitled “Anti-Mansionization and Anti-Look Alike Regulation.” In it, he summarized many of the regulatory tools that municipalities look to in trying to regulate this problem:

*Regulatory Approaches, Set back requirements, Footprint, Floor area Ratio, Height, Plate Height, Cubic Footage, Aspen, FAR alone didn’t work, Add cubic footage, and plate heights are held down, Cubic content ratio—“... a measure of land use intensity, expressing the mathematical relationship between the cubic content of a building and the unit of land. It is arrived at by dividing gross cubic content, as calculated by multiplying building height...times exterior building width times exterior building depth of all structures by the gross area of the lot.”*

The presentation went on to indicate that in Palm Beach, Florida, cubic footage regulated in zones with lot size of at least 10,000 square feet reduced footage from 5,000 to about 3,650 square feet. In Santa Monica, the floor area ratios, building height and coverage regulation reduced the heights from 35 to 30 and then 28 feet, with upper stories smaller and 25% of the building above 14 feet had to be set back 5 feet further from the street. The lecture also mentioned the city of Pasadena, California; Newton, Massachusetts; Chelmsford, Massachusetts (requiring site plan review for projects over 4,000 square feet) and the cities of Lincoln, Massachusetts; North

Hempstead, New York; Winnetka, Illinois; Lake Forest, Illinois; Park Ridge, Illinois and Hinsdale, Illinois, all having either floor area ratio requirements or the more stringent cubic volume requirements (Lake Forest, Illinois and Palm Beach, Florida).<sup>10</sup>

Clearly, higher density municipalities have now acted; the regulations are in place and they're being applied. These municipalities and the regulatory framework in general have recognized the phenomenon as a problem. The question now becomes: are the regulations enforceable and what challenges have been brought against them? Powell's Treatise on Real Property, a respected encyclopedia, summarizes the law as it relates to reasonable restrictions on extension and enlargement:

*12-79C [c]. Localities Restrict Extension and Enlargement of Nonconforming Uses and Buildings. [i] Courts Uphold Reasonable Restrictions Placed on Extension and Enlargement. Except as authorized by zoning regulations, nonconforming buildings and uses generally cannot be expanded or enlarged. In some jurisdictions "natural expansion" of nonconforming uses is permitted. Some zoning provisions, moreover, specifically prohibit the extension or enlargement of nonconforming uses. However, the Virginia Supreme Court has held that hotel construction is not a violation of a city ordinance prohibiting increases in existing nonconformity, where the nonconformity was not increased, because the addition of a permitted use to a nonconforming use is not an impermissible enlargement of a nonconforming use. Similarly, an Illinois appellate court found that, although a city's zoning ordinance placed limitations upon additions to and enlargements of a building that is nonconforming as to*

*bulk; it placed no restrictions upon alterations, structural repairs, or rehabilitation to such a building. Therefore, the court concluded that nonconforming bulk buildings could be lawfully rehabilitated provided that the rehabilitation conforms to the zoning requirements. However, in Pennsylvania, courts have held that municipalities cannot prohibit natural expansion of nonconforming uses.*<sup>11</sup>

Most of the law in this area, as Powell points out, deals with the question of land owners trying to expand nonconforming buildings, not new ones. Most of the time, this issue arises in the context of an addition or potential nonconforming enlargement of an existing structure. Massachusetts, though, has gone a lot further. In a 2008 Supreme Judicial Court opinion, Massachusetts ruled expressly on a mansionization ordinance in determining whether the municipality could deny a land owner the right to substantially enlarge their structure. In an article discussing the case, *Bjorklund v. Zoning Bd. of Appeals of Norwell*, 450 Mass. 357, 878 N.E.2d 915 (2008), author Mark Kablack summarized its holding:

*Bjorklund contains a factual history that is common to tear-downs generally. In Bjorklund, plaintiffs proposed to tear down a small, one-story home in a residential neighborhood (675 sq. ft. in area, and 30' wide), and replace it with a new two-story home (3,600 sq. ft. in area, and 60' wide). The existing lot and improvements predated zoning in the town of Norwell, invoking the grandfathered rights of c.40A, Section 6, because the lot area (34,507 sq. ft.) no longer complied with the Residence District A requirements (43,560 sq. ft.). The proposed new*

home, together with all amenities, would meet all dimensional requirements of current zoning in Norwell, but for the minimum lot area requirements.

Plaintiffs filed a request with the Norwell Zoning Board for a Section 6 finding and were initially denied any relief. After appeal and remand to the Land Court, the Zoning Board denied the Section 6 finding because the ‘new house’s length, height, and placement [would] intensify and exacerbate the present nonconformity of the property.’ Bjorklund at 361. Plaintiffs sought further appeal to the Land Court, where Judge Alexander H. Sands affirmed the Zoning Board’s decision ... According to Judge Sands, there was sufficient evidence to indicate that reconstruction would be substantially more detrimental to the neighborhood. Plaintiffs filed for further appeal, and the SJC transferred the case on its own motion for direct review on the sole issue of whether the proposed reconstruction would increase the nonconforming nature of the structure.

Contrary to the split decision in Bransford in 2005, the SJC affirmed the Land Court ruling in Bjorklund by a clear majority decision (by a vote of 5-2). The SJC appears to have been influenced in the case by the distinct size difference between the existing and proposed house, referring at one point to the fact that the new house will “quintuple the size” of the existing residence. *Id.* at 358. The SJC spent a considerable amount of time analyzing the comparative size of other houses in the neighborhood, and noted that all of the other homes in the vicinity of the project site, that were located on undersized lots, were of a ‘smaller, rural

farm-house type.’ *Id.* at 360. The Court was also swayed by the policy considerations regarding ‘mansionization.’ The Court made specific reference to the attempt by municipalities to reverse this trend, finding that ‘[m]unicipalities may permissibly exercise their police power to attempt to limit [the] potential adverse effects’ of converting smaller homes into significantly larger ones. *Id.* at 363. In making this policy consideration, the Court linked previously recognized policy goals concerning the critical need for affordable housing with the autonomy given to local communities to determine land use issues.<sup>12</sup>

The core of the opinion itself raised a very interesting issue: what if the mansionization ordinance has language in it that is vague and ambiguous as to the standard that the municipality is to apply in determining whether a violation takes place? Massachusetts law in this regard, general laws c.40A§6, first paragraph, provides in pertinent part:

*Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by Section 5, but shall apply to any change or substantial extension of such use, to a building or a special permit issued after the first notice of said public hearing, to any reconstruction, extension, or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially*

*different manner or to a substantially greater extent where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Massachusetts General Laws, Chapter 40A, Section 6.*

Replete through this statute are the phrases “any change or substantial extension” as applies to use or purpose. In essence, the municipality gets to make a relatively subjective decision on just how “substantial” the change or extension is going to be; it isn’t quantified in the statute and no specific guidelines or other indicators are given to reflect what constitutes a “substantial” extension or modification.

The author of the article, Mark Kablack, gave an interview talking about the significance of the Bjorklund case and idiosyncrasies of land use in Massachusetts that caused it to arise:

*Our lots are generally of substantial size. Substandard lot sizes and how they are treated in zoning is usually a matter of “grandfathering” them in. In Massachusetts, the concern about the size of houses is at a very local level; we have a very strong home rule philosophy dating back to the Colonial days. Each town governed itself and dealt with issues of security, taxation. The lack of a centralized State government agency dealing with these issues means that individual cities deal with it differently.*

*We have another issue, though. These homes present a number of issues. First, though, is the affordability issue—the expense of housing stock. The cost of housing here in Massachusetts is a problem in attracting and helping employees; we are losing some of them to North Carolina. This is a widely debated topic—one of*

*the legitimate reasons why communities could be concerned. The size, scale and massing are really secondary.*

*There’s a “welfare” issue. Do you have affordable housing stock for everyone? This issue is being reflected in policy decisions in the legislature but they have not fully come to grips with it.*

*The Home Builders Association of Massachusetts wants the process to be as objective as possible; predictable. The regulations create such a discretionary process that permitting becomes more unpredictable.*

*I don’t think that the long term trend is towards larger homes; we’ve reached a temporary peak, with interest rates low and college age children coming back to live in the home. I think there is a long term downward trend in home size and we need to work collectively to address the affordability issue. This is what is driving the density numbers.*

*Much of Massachusetts has one acre zoning—we can’t afford that type of zoning; the land costs and environmental consequences are significant. The question now is whether clustered housing is market driven or legislatively driven. Municipalities are not quite there yet.*

*We have gross infrastructure problems; most municipalities outside of the beltway are not sewerred and have poor roadways. Different degrees of density exist between California and Massachusetts.*

*One of the other problems that I see is that the permitting boards in Massachusetts have little training. There are bills in our legislature, but it is an unfunded mandate; there is no money to train and now*

*we have to tell the members half of the game is just knowing what the rules are.*<sup>13</sup>

In the same way that aesthetic regulation can be enormously subjective, so can mansionization when it is not tied to specific standards. This is a major problem; the system can't come to grips with the problem if the standards used to define it and regulate it are too subjective.

The question of reducing lot size and trying to encourage infill development and smaller homes in general isn't new; even with the economic recession of 2008, home prices are clearly out of reach for many Americans now. The Harvard report says so:

*Homeownership Trends. The US homeownership rate fell another 0.8 percentage point in 2011, the largest drop in seven consecutive years of decline. At 65.4 percent in the first quarter of 2012, the national rate stood at its lowest level since the first quarter of 1997 and 3.8 percentage points below the peak in the fourth quarter of 2004.*

*The persistent decline reflects both the high level of foreclosures and the slowdown in households moving into homeownership. Together, these forces have reduced the number of homeowners while increasing the number of renters. The particularly large drop last year represents an acceleration in both trends, with the number of owner households down by 350,000 and the number of net new renters up by 1.0 million. Measured from the peak number of homeowners in 2006, there were 1.0 million fewer owners and 3.9 million more renters at the end of 2011.*"<sup>14</sup>

In point of fact, will the economic collapse do what regulations and neighborhood dissent can only begin to alleviate? There is much truth in this forecast. Gino Canori, Senior Vice President of Related Partners, Inc., a mass homebuilder of affordable housing located in California but with projects around the United States, in an interview, talked at some length about trends in the market that he has seen now:

*A lot of factors are pushing people into multi-family and affordable housing. It's harder to get loans, people do not want to commute far away from work and generation Y purchasers tend to rely more on technology than space. We can squeeze down the lot size and offer higher levels of amenities. Related does its own research, both market and competitive, using both academics and experienced development consultants.*

*There is no question that sizes are getting smaller; the "not-in-my-backyard (NIM-BY)" phenomenon is increasing and accelerating. Living rooms are being eliminated; more efficient great rooms are now being planned into the design. A tech center is now located in the kitchen, decreasing the footprint but increasing the areas within the home.*

*We also note that with the change in ethnic makeup of the country, particularly with Asian and Indian families, extended families are being brought into the same home so the density increases even further.*<sup>15</sup>

Commentators have noted the potential negative effect of mansionization from an economic standpoint. In a 2006 Law Review

article, Catherine Durkin of The Catholic University makes this point:

*C. The Battle Against NIMBY Has Overlooked a Practice That Has the Same Exclusionary Effect — Mansionization. Despite the trend toward more judicial and legislative control over local zoning requirements, local authority to grant exceptions to zoning requirements remains broad. The various affordable housing strategies described have focused almost exclusively on new development proposals that aim to increase the supply of affordable workforce housing. Because current projections indicate that demand for affordable housing will continue to increase, this focus is well-placed. However, affordable housing strategies should consider the causes of the increase in home prices.*

*The local zoning authority's unfettered discretion to grant area variances is having a disparate effect on efforts to promote affordable workforce housing. Improper grants of area variances contribute to the growing problem of "mansionization," a "trend—now rampant in the close-in suburbs—of tearing down older homes and building million-dollar edifices in their place, often squeezed onto tiny lots." Mansionization will often require a deviation from the minimum set-back requirements or height requirements established by zoning regulations. The cumulative significance of improperly granting individual exceptions to zoning regulations that permit mansionization is considerable because it could unsystematically and permanently alter the character of a mixed-income community. First, demolishing an existing small or moderately sized home eliminates it altogether from*

*the market. Second, first-time home owners are unable to afford its replacement, a giant-sized, expensive home, commonly referred to as a "McMansion" or "Monster Home." Third, once mansionization catches on, developers with deep pockets can drive up the values of the surrounding properties, pricing workforce families and first-time homeowners out of the neighborhood completely. Moreover, opportunity and incentive to challenge area variances are minimal for those who are most adversely affected by these decisions. This is because they either lack legal resources and knowledge, or, in the case of future residents, because they are simply not in a position to challenge the decisions. Therefore, courts never review most variance grants.<sup>16</sup>*

These arguments have some compelling force; blue collar neighborhoods are less likely to see the expansion as something to object to; they see it more as a sign of success and something to emulate. The residents clearly lack either the sophistication or the financial ability to contest these issues, as the Catholic University article points out, too.

And wealthier neighborhoods seem to be willing to complain about it and enact regulation to try to control it. In a particularly humorous article written by veteran land use and zoning attorney and professor, John J. Delaney of Bethesda, Maryland, in 2007, he chronicles the town of Chevy Chase, Maryland and an attempt by the town to enact a moratorium on further development to study mansionization. This is a remedy (enactment of moratoria) that the Metropolitan Washington Council of Governments listed in its arsenal as a way for certain municipalities to control the trend. In the 2005 case of *Chalon Drive, LLC. V. Town of Chevy Chase, Cir-*

*cuit Court for Montgomery County, Maryland—2005 Case No. 263808-V, the town dealt with it in this manner:*

*According to the Murtaugh Study, residents of the Town have been deeply divided over its future for many years, particularly over the issue of “mansionization” and how the reconstruction/replacement of the generally older and more “run-down” homes in the eastern (Bethesda) area of the Town should be handled. Many residents on the eastern (Connecticut Avenue) side had previously been unsuccessful in having the Town formally designated as an historic district. Chagrined over this turn of events, they sought to gain more control over “teardowns and additions,” and they convinced the Town Council to form a ‘Construction Committee’ to study the problem.*

*Apparently, there was a deep mistrust of builders and developers among members of the Construction Committee, such that for nearly three years prior to the Town’s enactment of the moratorium on building permit approvals in August 2005, the Construction Committee did not communicate with the building community even though the latter was perceived by many people as the major cause of the problem....*

*The crisis deepened as the Town Council moved toward consideration—and finally enactment of—a moratorium on demolition and building permits. Notice of important meetings was provided to residents only, not to non-resident owners such as builders and developers. Moreover, as the date for enactment of the moratorium drew near, the Town precipitously changed its procedures and*

*refused to process timely-filed demolition and building permit applications....*

*As the two sides prepared for trial Chalon opted to seek a waiver from the Mayor and Council of Town, as provided in the Moratorium Ordinance. Crucial to the favorable outcome of the waiver process were the following elements:*

- *the good reputation and track record of Chalon;*
- *the involvement of nearby homeowners who had previously met with Chalon and had their concerns addressed; and*
- *the size of the two lots (more than 12,000 s.f. each) which were more than double the minimum size required in the R-60 zone. This allowed the builder greater flexibility to save more trees and make reasonable adjustments to the two houses.*

*The Waiver was granted with acceptable conditions and upon issuance of the Town permits, the law suit was dismissed.<sup>17</sup>*

In an interview with attorney Delaney, he opined that the issue of mansionization has essentially passed:

*This phenomenon has now passed in this country; it faded about five or six years ago. The equal protections argument and common sense are the best remedies, along with a site plan ordinance. I think the horse is out of the stable. There is no vested right to existing zoning, but the citizen’s real remedy is to lobby to get a site plan review to address the problem.<sup>18</sup>*

Some cities have gone further. In particular, the city of Studio City, California, unsatisfied with the City of Los Angeles’s mansionization ordinance, lobbied for and got an “overlay” to make the mandate even tougher:

*A proposal designed to curtail so-called McMansions in Studio City has divided the community but could serve as a model for other neighborhoods that continue to be unhappy with oversized homes.*

*The city of Los Angeles already has a mansionization ordinance that restricts new houses from towering over their neighbors. But the law also allowed communities to tailor the rules to their needs—and Studio City is now choosing to tighten the restrictions even more.*

*On Tuesday, the City Council voted 13-0 in favor of Studio City's new overlay zone. Aides to Mayor Antonio Villaraigosa said he is studying the measure, which applies to 3,900 homes in the Studio City flatlands but not the hillside areas.*

*Alan Dymond, president of the Studio City Residents Association, said the proposal is the result of more than two dozen community meetings.*

*"When we started there was opposition on a number of issues," Dymond said. "What you have before you is a compromise that most developers can live with."*

*Originally proposed when Controller Wendy Greuel was the area's council member, the residential floor area (RFA) plan is a supplement to the baseline mansionization ordinance that the city adopted in 2008 to try to control the size of houses.*

*"Our concern was getting the original baseline mansionization ordinance passed to try to control some of the more outrageous homes," Greuel said. "We wanted to include a provision to include communities to adopt their own standards for neighborhoods. There are examples*

*of properties around the city that people look at and say, 'This is exactly what we don't want in our neighborhood.' This gives them the chance to address that."*

....

*Under the measure, residents will be allowed to build a house that takes up 40 percent of the land. But they could build bigger if they meet bonus criteria, such as constructing a certified 'green' house, reducing the building height or increasing the side yard setback....*

*Some residents still oppose the plan, feeling it takes away their property rights. Resident Ron Roy said he believed the proposal would be opposed by a majority of residents. "It's bad legislation which will be aggressively challenged," Roy said. "I believe a majority of open-minded Studio City residents would oppose this."*

*Another resident, Linda Clark, called the measure "patently unfair." "None of us want mansions, but this doesn't make any sense when it doesn't apply to the hillside area," Clark said. "The city worked with only one small group who want this RFA. There should be an option to have no RFA."<sup>19</sup>*

Clearly, mansionization is still alive and well, although much of the force and immediate impact of the problem has been blunted by the economic recession of 2008 and changing tastes. Courts seem somewhat impotent in dealing with the problem; vague and amorphous regulations designed to be inclusive survive judicial scrutiny because of courts' long-standing antipathy to getting involved in zoning disputes. See, e.g., attorney Lora Lucero's comment in her summary of

the Bjorklund case for the American Planning Association's March 2008 issue of its magazine *Planning*:

*The court noted the popular trend of "mansionization" and that "the expansion of smaller houses into significantly larger ones decreases the availability of would-be 'starter' homes in a community, perhaps excluding families of low to moderate income from neighborhoods." The city may use its police power to limit these potential adverse effects.*<sup>20</sup>

Regulation, as always, is slow to address problems; solutions are often several years behind problems. That may very well be the case now; with the advent of higher density projects, cultural shifts with extended families living in smaller quarters, children returning home under adverse economic circumstances, and difficulty in obtaining residential financing, the urgency to deal with mansionization may very well have abated.

Significant differences of opinion exist among all of the stakeholders; homebuilders, architects, economists, academics, and planners, as to whether larger-sized homes are going to return. The interesting question, though, is whether, if and when the economy turns around, we'll see them come back. If we do, the regulatory climate that all of the parties face will be a different one than the one they found in the late 1990's and early 2000's; a lot of time, energy, effort and money has been spent trying to figure out how to deal with it. This time, though, the courts will not have made much of an inroad in coming to grips with the problem; solutions have been left in the hands of the planners and the municipalities.

---

## NOTES

1. "What to do about ... Mansionization ... encourage, prohibit or simply manage? Community Impacts & Policy Alternatives." June 2006. Metropolitan Washington Council of Governments Institute for Regional Excellence, Page 2, Paragraph 6.
2. The State of the Nation's Housing 2012. The Joint Center for Housing Studies of Harvard University, Page 7, Paragraphs 1 through 4. Joint Center for Housing Studies of Harvard University; 1033 Massachusetts Avenue, 5th Floor, Cambridge, Massachusetts 02138; www.jchs.harvard.edu.
3. The State of the Nation's Housing 2012. The Joint Center for Housing Studies of Harvard University, Page 1, Paragraphs 1 and 2.
4. National Association of Home Builders: Our Organization. www.nahb.org/page.aspx/generic/sectionID=89; Page 1, Paragraph 2.
5. National Association of Home Builders; The New Home in 2015; December 2010; Economics and Housing Policy Group. Page 12, Lines 15 through 25. The author interviewed Stephen Melman, Director of Economic Services for the National Association of Home Builders via e-mail on September 28th, 2012 ("The most recent census data report that despite a weak economy, the average floor area of new homes completed increased some 3.7% from 2010 to 2011. That increase is more suggestive of the fact that lenders are requiring higher credit scores and larger down payments for new homes, pricing first-time buyers out of the market.")
6. Mansionization ... encourage, prohibit or simply manage? Community Impacts & Policy Alternatives, June 2006, Metropolitan Washington Council of Governments Institute for Regional Excellence. Page 7, Paragraph 2.
7. "Big Homes Are Back in Business" by Dawn Wotapka; *Wall Street Journal*; Real Estate Section June 7, 2012. Pages 1 and 2.
8. "McMansion Creep: Homes Rising in Size" by Dawn Wotapka; *Wall Street Journal*; Real Estate Section, June 21, 2012. Page 1.
9. Mansionization ... encourage, prohibit or simply manage? Community Impacts & Policy Alternatives, June 2006, Metropolitan Washington Council of Governments Institute for Regional Excellence. Page 2, Paragraphs 2 and

3. See also interview with Tanya A. Spano, Metropolitan Washington Council of Governments, Department of Environmental Programs, Mansionization Team Member of November 13, 2002 with author.
10. “Anti-Mansionization and Anti-Look Alike Regulation”—American Planning Association Annual Conference, Denver, CO, April 1, 2003. By Dwight Merriam, FAICP, CRE. Power Point presentation, pages 3 through 17. Also note by the same author, “Scrape-Offs and McMansions: Are Monster Homes Sustainable?” Rocky Mountain Land Use Institute, 17th annual Land Use Conference, March 7th, 2008
11. Powell on Real Property — 12-79C § 79C.06. V. Relations Between the Owner of a Permissible Interest in Land and the Community (CHS.69-79G). Chapter 79C Zoning. For a similar perspective from another well-respected treatise, see Zoning and Land Use Controls, Matthew Bender and Company, Chapter V Traditional Zoning, Chapter 41 Nonconforming Uses 1; 7-41 Zoning and Land Use Controls Section 41.03
12. “The SJC Closed the Front Door to Mansionization” by Mark A Kablack. Second Quarter 2008 issue of Mass Builder, the official magazine of the Home Builders Association of Massachusetts, Pages 1 and 2.
13. Interview with Mark Kablack, Attorney, of November 2, 2012. See also Sheppard v. Zoning Board of Appeal of Boston (2012), 81 Mass. App.Ct. 394, 963 N.E.2d 748, and Shirley Wayside Limited Partnership v. Board of Appeals of Shirley (2011) 461 Mass. 469, 961 N.E.2d 1055, both citing Bjorklund. For a California judicial perspective, the unpublished 2008 case of Miller v. City Council of Laguna Beach, 2008 Cal.App. Unpub. Lexis 2972 reviews municipal design review guidelines incorporating mansionization guidelines.
14. The State of the Nation’s Housing 2012. The Joint Center for Housing Studies of Harvard University, Page 17, Paragraphs 1 and 2.
15. Interview with Gino Canori, Senior Vice President of Development of Related Partners, Inc., Irvine, California of November 6, 2012.
16. “Comment: The Exclusionary Effect of “Mansionization”: Area Variances Undermine Efforts to Achieve Housing Affordability” by Catherine Durkin. Winter 2006, 55 Catholic University Law Review at 439 at 467-468.
17. ALI-ABA Course of Study, Land Use Institute: Planning, Regulation, Litigation, Eminent Domain and Compensation. August 16-18, 2007, San Francisco, California. “Teardowns and ‘Mansionization’ — Anatomy of a Case in Chevy Chase” by John J. Delaney, Linowes and Blocher LLP, Bethesda, Maryland, Pages 3, 4, 10.
18. Interview with John J. Delaney, Irvine, California, November 13, 2012.
19. “Council OK’s neighborhood plan to restrict McMansions in Studio City,” by Rick Orlov, dated February 8, 2012; see [www.dailynews.com/news/ci\\_19923518](http://www.dailynews.com/news/ci_19923518)
20. American Planning Association, *Planning Magazine*, March 2008; “Massachusetts’s highest court acknowledges negative impacts of teardowns and ‘mansionization’” by Lora Lucero, AICP. Page 47.

Visit West on the Internet! [store.westlaw.com](http://store.westlaw.com)